No. 20653

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD C. PRICE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board

REPLY BRIEF

For Richard C. Price

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In the brief previously filed with the Court, Petitioner showed, among other things, that: (1) the Act grants to employees a right to refrain from engaging in concerted activities for the purposes of collective bargaining, which right is specifically implemented by another statutory right—the right to petition for the decertification of a union having the status of a bargaining representative; and (2) the

public interest in protecting the Board's processes is necessarily paramount to whatever immunity the Act grants to unions in the regulation of their internal affairs. In their briefs in support of the Board's decision, both the Board and the intervening Steelworkers have ignored completely the "rights" thus conferred upon employees by the Act. Both the Board and the Steelworkers, moreover, have rested the main thrust of their arguments on assertions that Local 4028's action against Price was privileged as a measure relating solely to "internal union affairs." In the circumstances and context of this case, however, such assertions necessarily distort the common understanding of what is, or might be, "internal" to a private membership association; indeed, by magnifying their distortion into a union privilege superior to the rights given employees under the Act, the assertions also attribute to the notion of "internal union affairs" a meaning far beyond that which Congress intended when it enacted Section 8(b)(1)(A) of the Act.

It is clear that Local 4028 was not regulating a matter "internal" to itself; on the contrary, it was regulating a member-employee who had invoked the Board's procedures, and, therefore, in a very real sense, Local 4028 was regulating the processes of the federal government itself. As the Court said in *Roberts* v. *N.L.R.B.*, 350 F.2d 427, 429 (C.A.D.C.), with respect to the Board's inhibition of union retaliation for filing a Board charge: "This is not . . . an inroad upon those internal union affairs left by the Act and its policy to be administered solely by the Union."

In the final analysis, this case boils down to a simple question: may an employee exercise his statutory

right to file a decertification petition without having that right nullified by union punitive action against him? For it is perfectly clear that this case concerns, fundamentally, Price's statutory rights as an employee, as well as the Board's obligation in the public interest to protect those rights. Thus viewed, it is equally clear that Price's standing as a union member and Local 4028's interest in maintaining its position as a bargaining representative,[1] are subordinate, if not completely irrelevant, considerations.

In view of the Board's holding in *Local 138, Operating Engineers (Charles S. Skura)*, 148 NLRB 679,[2]

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[1] In partial answer to the Board's position (see, also, Bd. Br. p. 16) that Local 4028's punitive action against Price was justified in order "to preserve the very existence of the union," Petitioner has pointed out that there is nothing in the record to show that Local 4028's membership was limited to Pittsburgh-Des Moines employees, or that Local 4028 did not represent employees of employers other than Pittsburgh-Des Moines (Pet. Br. p. 22, n. 29). In view of the record's silence, the assertion in the Steelworkers' brief that "Local 4028 serves only this one plant and its only members are the employees at this plant" (St. Br. p. 1), necessarily is nothing more than counsel's gratuitous comment.

Nor is there any record basis whatever for the unwarranted statement in the Steelworkers' brief (St. Br. n. 2, pp. 2-3) that the rescission of Price's fine "was intended and was understood" as "erasing" the costs-of-hearing penalty imposed on Price.

[2] Since Petitioner's brief was filed, the Board has twice reaffirmed its *Skura* holding: *Houston Typographical Union No. 87 (Don P. Bosworth)*, 158 NLRB No. 104, 62 LRRM 1174 (fine or assessment imposed by union on employee to meet legal costs in defending against NLRB unfair labor practice charges held to violate Section 8(b)(1)(A)); *Cannery Workers Union of the Pacific (Van Camp Sea Food*

which holding was expressly approved in *Roberts* v. *N.L.R.B.*, *supra*, the Board's failure in this case to protect its own processes against Local 4028's subversion is incomprehensible. For, as the Seventh Circuit has noted, the Board's *Skura* ruling "was based on the principle that a union rule which seeks to frustrate the right of members to avail themselves of the services of the Board is contrary to recognized public policies and beyond the competence of a union to enforce by coercive means." *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 60 LRRM 2097, 2101. The best that the Board has been able to do is to attempt to distinguish the *Skura* and *Roberts* cases on the asserted ground that the latter cases involved the invocation of the Board's processes to remedy "union infringement of [employee] statutory rights" to be free of job discrimination (Bd. Br. pp. 18-21). But this purported distinction is, of course, utterly specious. Not only does the Board thereby differentiate between the various rights given employees under the Act, but it is seemingly propounding the view that its obligation is to protect, in the public interest, only those employee rights with which its own predilections and sympathies coincide. However, just as the employees in *Skura* and *Roberts* were entitled to invoke the Board's processes pursuant to their substantive right to be free of union-caused job discrimination, so, here, Price was entitled to invoke the Board's processes pursuant to his procedural right to file a petition intended to accomplish Local 4028's decertification. Moreover, Price's procedural right so to petition

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Co., Inc.), 159 NLRB No. 47, 62 LRRM 1298 (*expulsion* from union for filing NLRB unfair labor practice charges held to violate the same section).

necessarily involved the implementation of his substantive Section 7 right "to refrain" from engaging in self-organization or other concerted activities.

Nor may *Skura* and *Roberts* be distinguished, as the Board's brief also suggests (Bd. Br. pp. 19-20), on the ground that the union there involved had originally been charged with "an alleged statutory wrong," whereas there is here no suggestion that Local 4028's underlying status was unlawful. For this, too, misses the point that the gravamen of the *Skura* violation was not the fact that the union involved may have in the first instance transgressed the Act, but rather that a violation occurred when the union punished a member who had sought to bring such alleged violation to the Board's attention.

Below, we demonstrate that other contentions advanced by the Board and the Steelworkers are equally fallacious.

I. Contrary to the Board and the Union, the Proviso to Section 8(b)(1)(A) of the Act Does Not Privilege Local 4028's Action Against Price.

The contention is made in the briefs filed herein by the Board and the Steelworkers that the proviso to Section 8(b)(1)(A) privileges the punitive action Local 4028 took against Price. The nub of this contention is that the legislative history of that proviso shows that Congress did not intend, when it enacted Section 8(b)(1)(A), to place limitations on union disciplinary powers over what is referred to in the briefs as "the internal affairs of labor unions" (Bd. Br. pp. 7-15; St. Br. pp. 3-7, 15).

Insofar as the Board is concerned, it is pertinent to note that if there is any validity to this legislative

history-proviso argument, the theory is equally applicable in the *Skura* kind of situation. Certainly, if the filing of a Board decertification petition is "a union internal affair," so, too, is the filing of a Board unfair labor practice charge; and if the proviso's legislative history is controlling in Price's case, clear thinking would dictate that it was also controlling in Skura's. In short, neither matter is more or less "internal" to a union's functions and operations than is the other. In any event, there is no need to resolve this question, for the proviso has a meaning different from that stated by the Board and the Steelworkers, and it is not applicable in either instance.

It has already been shown that when Congress enacted Section 8(b)(1)(A), it intended, in the Supreme Court's words, "to impose upon unions the same restrictions which the Wagner Act imposed upon employers with respect to violations of employee rights" (Pet. Br. pp. 12-13). As for the Congressional intent underlying the proviso to Section 8(b)(1)(A), the proviso's legislative history confirms what is shown by its explicit language—that Congress, in enacting the proviso, simply intended to assure that (8)(b)(1)(A) be not interpreted so as to restrict a union's privilege of prescribing who would be admitted, and who would be expelled, from union membership. Thus, the proviso was offered as an amendment to Section 8(b)(1)(A) during the Senate debate on that section of the Act. The proviso's purpose was explained by its sponsor, Senator Holland of Florida, as follows (93 *Daily Congressional Record* 4398; 2 *Legislative History of the Labor Management Relations Act of 1947*, p. 1139, hereinafter cited as "Leg. Hist."):

> I offer an amendment in the nature of a substitute for the amendment of the Senator from Minnesota . . . I have had some discussion with the Senator from Minnesota [Mr. Ball] and the Senator from Ohio [Mr. Taft] and with other Senators in reference to the meaning of the pending amendment and as to how seriously, if at all, it would affect the internal administration of a labor union.
>
> Apparently it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with *the admission or expulsion of members, that is, with the questions of membership.* So I offer an amendment which is a substitute for the amendment of the Senator from Minnesota. (Emphasis supplied.)

At a later point in the debate Senator Holland said (93 *Daily Congressional Record* 4400; 2 *Leg. Hist.* 1141):

> . . . if accepted by the sponsors of the pending amendment, the inserted words would make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership *either with respect to beginning or terminating membership.* I understand that the amendment so offered meets with no serious objection on the part of the sponsors of the pending amendment. (Emphasis supplied.)

Then the following colloquy ensued between Senators Pepper, Ball, and Taft (93 *Daily Congressional Record* 4400-4401; 2 *Leg. Hist.* 1141-1142):

> Mr. Pepper: . . . In discussion yesterday between the Senator from Ohio and myself with

respect to another part of the bill, dealing with the closed shop or the union shop, the Senator from Ohio stated what I recall his having stated in the committee, that if a union claimed the advantage of the status of a closed shop or union shop, it would have to have what the Senator called democracy in respect to the admission of members. I understood the Senator to say that that would mean that anyone who presented himself and was qualified in other respects for membership, and who complied with the usual conditions of membership, such as the payment of dues, and so forth, would be entitled to membership.

* * * *

Mr. Taft: I did not say that. The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.

Mr. Pepper: Am I correct in assuming that it is the interpretation of the Senator from Ohio and the Senator from Minnesota that *there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members,* and that if the union wishes to discriminate in respect to membership, there is no provision in the bill which denies it the privilege of doing so?

Mr. Ball: Absolutely not. If the union expels a member of the union for any other reason

> than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. It can expel him from the union at any time it wishes to do so, and for any reason.[3]

After the proviso was accepted, the sponsors of Section 8(b)(1)(A) continued to urge that the purpose of the Section, notwithstanding the proviso, was to give employees the same protection against union restraint and coercion as they already were enjoying with respect to employer restraint and coercion. See, for example, Senator Taft's statement, 93 *Daily Congressional Record* 4563; 2 *Leg. Hist.* 1206. Moreover, the proviso was of such little consequence that it was not even mentioned in the report of the Conference Committee on the bill that was ultimately enacted. House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., 42-43; 1 *Leg. Hist.* 546-547.

In the light of this legislative history, the established principle of strict construction of provisos clearly applies to the Section 8(b)(1)(A) proviso. In *United States* v. *Dickson*, 40 U.S. 141, 165, the Supreme Court said:

> Passing from these considerations to another which necessarily brings under review the second point of objections to the charge of the court below, we are led to the general rule of law which has always prevailed, and has become consecrated almost as a maxim in the interpretation of stat-

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[3] The Seventh Circuit has pointed out that insofar as legislative history indicates that expulsion from union membership is privileged, it refers not to Section 8(b)(1)(A) of the Act, but rather to Section 8(a)(3). *Allis-Chalmers Mfg. Co.*, 358 F.2d 656, 659, 61 LRRM 2498, 2500.

> utes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.

Similarly, in *Korherr* v. *Bumb*, 262 F.2d 157, 162 (C.A. 9), this Court said:

> . . . where words of exception are used, they are to be strictly construed to limit the exception . . . .

Accord: *Union Starch & Refining Company*, 87 NLRB 779, 784.

To recapitulate: The Seventh Circuit has held that Section 8(b)(1)(A) presents no ambiguities whatsoever, and, therefore, does not require recourse to legislative history for clarification. *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 358 F.2d 656, 660, 61 LRRM 2498, 2500. Moreover, the pertinent legislative history, if considered, does not support the Board's position. Thus, insofar as the term "internal union affairs" appears in the legislative history of Section 8(b)(1)(A)'s proviso, the term appears to have a meaning corresponding to, or synonymous with, the "qualifications" that unions may place on the "beginning or terminating" of union membership. Perhaps the term might even be stretched to signify union rules pertaining to attendance requirements at union meetings, the fixing of election proceedings, and the calling of strikes. See *Associated Home Builders of Greater East Bay, Inc.* v. *N.L.R.B.*, 352 F.2d 745, 748 (C.A.

9). But it is patently evident that there is nothing in the excerpts from the legislative history set forth in the briefs filed by the Board and the Steelworkers,[4] or, for that matter, in the history quoted above, to warrant attributing either to the proviso or to the subsumed term "internal union affairs" the meaning urged by the Board and the Steelworkers. Just as the union rule setting production quotas in *Associated Home Builders* "cannot come within the proviso of § 8(b)(1)(A) for this was not a mere prescribing by the Unions of rules with respect to acquisition or retention of membership therein" (352 F.2d at 750), so the rule here—Article XII of the Steelworkers Constitution (R. 17)—"cannot come" within the proviso. For the Steelworkers rule, *as interpreted and applied*, regulated, not a union matter, but rather the exercise by an employee-member of his statutory rights and the interconnection between him and the Board itself.

II. No Valid Distinction Can Be Made Between Local 4028's Fining Price and Its Action Suspending Him From Union Membership.

Distinguishing between Local 4028's fining of Price and its action in suspending him from union membership, the Steelworkers argue that suspension or expulsion from union membership cannot violate Section 8(b)(1)(A) of the Act (St. Br. pp. 3-10).[5] However,

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[4] See n. 3, *supra*.

[5] The Steelworkers assert that Price's suspension was justified because "a union engaged in a struggle for its survival cannot retain as members those seeking its demise" (St. Br. p. 9). In *Cannery Workers*, 159 NLRB No. 47, 62 LRRM

the distinction thus drawn has no validity, and the Board's brief expressly admits that "there is some coercion and restraint involved when a union suspends one of its members" (Bd. Br. n. 5 at p. 6). *Accord*, that suspension or expulsion from union membership is coercive: *Cannery Workers Union of the Pacific (Van Camp Sea Food Co., Inc.)*, 159 NLRB No. 47, 62 LRRM 1298; *Local 283, UAW (Wisconsin Motor Corporation)*, 145 NLRB 1097, 1101-1102; *Peerless Tool and Engineering Co.*, 111 NLRB 853, 857.

In the *Cannery Workers* case, *supra*, where the Board reaffirmed its *Skura* ruling and held that expulsion from union membership for filing unfair labor practice charges against a union was an action not protected by the proviso to Section 8(b)(1)(A), the Board said (62 LRRM at 1299): "We are un-

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1298, which is relied on to support the Board's position (Bd. Br. n. 14, p. 19), the oBard in effect says the same thing (62 LRRM at 1301): "To require [a union and its adherents] to tolerate an active opponent within their ranks [during an election campaign] would undermine their collective action and thereby tend to distort the results of the election." The facts, however, belie these assertions. Thus, in August 1964, the Steelworkers won the election held on Price's decertification petition (R. 7, 16); and, in view of the command of Section 9(c)(3) of the Act that "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held," at least a year had to elapse before another election could have been held among the Pittsburgh-Des Moines employees. *But Price's 5-year suspension has been in effect continuously since June 1964 (R. 17-18), and, except for the possibility of compulsion by this Court, there is no indication that the suspension will be lifted before 1969.*

able to conclude that a reading of the proviso to Section 8(b)(1)(A) permits a valid distinction to be drawn between fines and expulsions meted out by a union to punish one of its members for filing charges with the Board." And, quoting from *Mitchell* v. *International Association of Machinists*, 16 Cal. Rept. 813, 815, 49 LRRM 2116 (Cal. Dist. Ct. of Appeals, 2d District), the Board explained in *Cannery Workers* that expulsion from union membership is coercive because job retention is not the only "value" involved in such membership. On the contrary, the Board indicated, there were others, including a "financial stake" in various funds to which the member may have contributed.

Courts have likewise recognized that valuable "property rights" are inherent in union membership, and have, for that reason, protected members against arbitrary or irregular expulsions. See *Musicians Protective Ass'n, Local 466* v. *Semon*, 254 S.W.2d 211, 213 (Tex. Ct. Civ. App.); *Mahoney* v. *Sailors' Union of the Pacific*, 43 Wash.2d 874, 264 P.2d 1095, 1097; *Armstrong* v. *Duffy*, 90 Ohio App. 233, 103 N.E.2d 760, 766; *Fleming* v. *Motion Picture Machine Operators*, 124 N.J.Eq. 269, 270, 1 A.2d 386, 387. Such "property rights" include the member's interest in the union's accumulated assets, in sick and death benefit funds, and in disability, old-age, accident, and sickness insurance. See *Spayd* v. *Ringing Rock Lodge No. 655*, 270 Pa. 67, 113 Atl. 70; *LoBianco* v. *Cushing*, 117 N.J.Eq. 593, 177 Atl. 102, 104. The right to be a candidate for, and to hold, union office, is another such "right." See *Armstrong* v. *Duffy*, *supra*. Moreover, the "social ramifications" of union mem-

bership cannot be overlooked. See *Mitchell* v. *International Association of Machinists, supra.*

III. Contrary to the Steelworkers, the Board Was Required to Rule on the Fine Levied Against Price.

Petitioner has already shown that the fine levied against Price is an "operative" factor in the case before the Court, and that the Board erred in treating the matter differently (Pet. Br. pp. 24-26). The Steelworkers contend that the Board had "discretion" not to rule on the fine's validity, asserting that the "practice" had either stopped or "had never reached fruition" (St. Br. pp. 10-12).[6] This contention is clearly fallacious.

The Steelworkers "fruition" argument, which is based on an assertion that only "final action" by the Steelworkers International could be coercive (St. Br. p. 12), obviously misses the point. For it is the very fact that Local 4028 levied the fine in the first place that caused Price to suffer detriment. Analyzed, the detriment inherent in the fine consisted of at least two elements: the mental anguish and discomfort of being placed under an obligation to pay the fine;[7]

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[6] The Board's brief states that the fine levied against Price became "irrelevant" after the Steelworkers' Executive Board "upheld [Price's] appeal" (Bd. Br. n. 5, p. 6). Of course, Price's appeal was not "upheld"; the Executive Board "withdrew" the fine, but "left in full effect the remaining penalties against Price" (R. 18). Moreover, the fine levied against Price was not "irrelevant" as shown in Petitioner's original brief herein, pages 24-26.

[7] The Steelworkers' brief suggests that the fine levied against Price was enforceable only by suspension or expulsion, and asserts that this is the "traditional" method employed

and the inconvenience and uncertainty involved in effecting an appeal from Local 4028's action. Moreover, realistic consideration of the fine cannot be restricted to Price alone; the fine levied affected members of Local 4028 other than Price. See *Local 542, International Union of Operating Engineers, AFL-CIO* v. *N.L.R.B.*, 328 F.2d 850, 852-853 (C.A. 3), *cert. denied*, 379 U.S. 826.

Nor are the Steelworkers on any firmer ground when they assert that it was within the Board's discretion not to rule on the fine. In the first place, it is clear that the Board's finding that the fine was not "an operative factor in this case" was a specific ruling upon the matter—albeit a wrong one. Secondly, as the complaint against Local 4028 and Local 4028's answer thereto placed "in issue" the fine levied against Price, and as this issue was "fully litigated," the Board was under an obligation to pass upon it. See *Frito Company, Western Division* v. *N.L.R.B.*, 330 F.2d 458, 463, 465 (C.A. 9); *N.L.R.B.* v. *Sterling Furniture Co.*, 202 F.2d 41 (C.A. 9). See also, *Associated Home Builders* v. *N.L.R.B.*, 352 F.2d 745,

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by the Steelworkers International and its local unions to collect fines (St. Br. pp. 12-13). It is pertinent to note that this assertion is supported by no record evidence; counsel's "awareness" of the experience of the Steelworkers International is immaterial. Unions, moreover, do in fact avail themselves of legal process to collect fines. See *Local 248, United Automobile, Aerospace and Agricultural Implement Workers of America (Allis-Chalmers Manufacturing Co.)*, 149 NLRB 67, 68; *Local 283, United Automobile, Aerospace and Agricultural Implement Workers of America (Wisconsin Motor Corporation)*, 145 NLRB 1097, 1099.

752-754 (C.A. 9); *Hughes Tool Company*, 147 NLRB 1573, 1576-1577.

Respectfully submitted,

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